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Attorneys for Plaintiff Fund for Jobs, Growth, & Security

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

FUND FOR JOBS, GROWTH, &
SECURITY, a Washington, D.C., not for
profit corporation,

Plaintiff,

v.

NEW JERSEY ELECTION LAW
ENFORCEMENT COMMISSION;
RONALD DEFILIPPIS, in his official
capacity as Chairman of New Jersey Election
Law Enforcement Commission; WALTER F.
TIMPONE, in his official capacity as Vice
Chairman of New Jersey Election Law
Enforcement Commission; AMOS C.
SAUNDERS, in his official capacity as New
Jersey Election Law Enforcement
Commission Commissioner; EDWIN R.
MATTHEWS, in his official capacity as
Legal Counsel of New Jersey Election Law
Enforcement Commission; and JEFFREY M.
BRINDLE, in his official capacity as
Executive Director of New Jersey Election
Law Enforcement Commission,

Defendants.

Civil Action No. _____

COMPLAINT

Document Electronically Filed

Plaintiff Fund for Jobs, Growth, & Security (the “Fund”), for its complaint in this matter, hereby alleges as follows:

NATURE OF THE ACTION

1. This is a civil action for declaratory and injunctive relief arising under the First and Fourteenth Amendments to the Constitution of the United States. It challenges the constitutionality of a provision of the New Jersey Election Statute that limits the amount of money that political committees may accept from various sources. Specifically, Section 19:44A-11.5 of the Election Statute bars a political organization, including those that, like the Fund, only make independent expenditures, from accepting more than \$7,200 per election from each individual, union, or corporation. *N.J.S.A. 19:44A-11.5*.

2. Plaintiff complains that this provision burdens and chills its speech and association, in violation of the First and Fourteenth Amendments to the United States Constitution.

JURISDICTION AND VENUE

3. This action arises under 42 U.S.C. § 1983 and the First Amendment to the Constitution of the United States, as made applicable to the states by the Fourteenth Amendment. It also arises under the Equal Protection Clause of the Fourteenth Amendment.

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a).

5. It also has jurisdiction pursuant to the Declaratory Judgment Act, codified at 28 U.S.C. §§ 2201 and 2202.

6. Venue is proper in this Court under 28 U.S.C. § 1391(b) because the events giving rise to this action occurred, and Defendants reside, in this District.

PARTIES

7. Plaintiff the Fund is a Washington, D.C., not-for-profit corporation dedicated to influencing state legislative elections nationwide through the use of independent expenditures. The Fund is registered as a political organization under Section 527 of the Internal Revenue Code. *See* Exhibit A. The Fund has a principal place of business at 455 Massachusetts Avenue NW, Suite 650, Washington, D.C. 20001.

8. Defendant New Jersey Election Law Enforcement Commission (“ELEC”) is the administrative agency responsible for enforcing and administering the New Jersey Campaign Contributions and Expenditures Reporting Act, *N.J.S.A. 19:44A-1, et seq.*, including the provision at issue in this litigation. ELEC has a principal place of business at 28 W. State Street, 13th Floor, Trenton, New Jersey 08625.

9. Defendant Ronald DeFilippis is the Chairman of ELEC. He acts under color of law and is sued in his official capacity.

10. Defendant Walter F. Timpone is the Vice Chairman of ELEC. He acts under color of law and is sued in his official capacity.

11. Defendant Amos C. Saunders is a Member of ELEC and serves as its Commissioner. He acts under color of law and is sued in his official capacity.

12. Defendant Edwin R. Matthews is a Member of ELEC and serves as its Legal Counsel. He acts under color of law and is sued in his official capacity.

13. Defendant Jeffrey M. Brindle is the Executive Director of ELEC. He acts under color of law and is sued in his official capacity.

STATEMENT OF FACTS

14. The Fund is a political organization incorporated in Washington, D.C. It was established to make independent expenditures in support of Democratic candidates in state legislative races across the country. The Fund does not make contributions to, or coordinated expenditures on behalf of, candidates or political party committees. Exhibit B (Declaration of Susan McCue) ¶¶ 4-5.

15. The Fund intends to solicit and accept contributions in excess of \$7,200 per source. *Id.* ¶ 6.

16. The Fund seeks to expressly advocate the election of Democratic legislative candidates in New Jersey as its major purpose. However, it is restricted from engaging in such political speech by New Jersey law and ELEC's interpretation and application of that law, both of which run counter to United States Supreme Court precedent.

Applicable Law

17. ELEC regulations define a "political committee" as "any group of two or more persons acting jointly, or any corporation, partnership or any other incorporated or unincorporated association, which is organized to or does aid or promote the nomination, election or defeat of any candidate or candidates for public office . . . if the persons, corporation, partnership, or incorporated or unincorporated association raises or expends \$2,400 or more to so aid or promote the nomination, election or defeat of a candidate or candidates." *N.J.A.C. 19:25-1.7.*

18. ELEC precedents further clarify that an organization must register as a political committee only if it has as its “major purpose” the aiding or promoting of New Jersey candidates. *See, e.g.*, ELEC Adv. Op. 01-2011; ELEC Adv. Op. 01-2012. Organizations that do not have this “major purpose”, including national political organizations that make independent expenditures supporting New Jersey candidates alongside other activities directed out-of-state, need not register as political committees and are not subject to the same restrictions as political committees, including the contribution limits described below.

19. New Jersey law limits the amount of money that political committees may accept from a single source. Specifically, the New Jersey Campaign Contributions and Expenditures Reporting Act, *N.J.S.A. 19:44A-1 et seq.* (the “Act”) bars a political committee from accepting more than \$7,200 from each individual, union, or corporation per election. *N.J.S.A. 19:44A-11.5*. The statute does not include an exception for political committees that make only independent expenditures and do not make contributions to, or coordinated expenditures on behalf of, candidates or party committees.

20. A violation of the contribution limits set forth in the Act carries with it hefty penalties. Any person who willfully makes or accepts any contribution in violation of the Act may be liable for up to \$200,000 in fines, depending on the total amount of contributions. *N.J.S.A. 19:44A-22(e)*. In addition, to enable it to investigate alleged violations effectively and enforce compliance with the Act’s provisions, ELEC has the authority to “issue subpoenas for the production of documents and the attendance of witnesses,” *id.* 19:44A-6(b)(9), and, when necessary, to initiate civil actions in any court of competent jurisdiction, *id.* 19:44A-6(b). ELEC also has authority to “[f]orward to the Attorney General . . . information concerning any

violations of the [A]ct which may become the subject of criminal prosecution.” *Id.* 19:44A-6(b)(10).

21. The Act’s limitations on political committees that limit their electoral activity to independent expenditures are inconsistent with the United States Supreme Court’s decision in *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876 (2010).

22. Advocacy accomplished by means of independent expenditures is political speech that is protected by the First Amendment. A limit on independent expenditures “heavily burdens core First Amendment expression.” *Buckley v. Valeo*, 424 U.S. 1, 48 (1976).

23. As political speech, expenditure limits are subject to strict scrutiny; that is, they must be narrowly tailored to a compelling interest. *Citizens United*, 130 S. Ct. at 898. The United States Supreme Court has recognized only one interest sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech: preventing *quid pro quo* corruption and the appearance of corruption. But as a matter of law, “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” *Id.* at 909. Accordingly, the Supreme Court has held that the government lacked a compelling basis to bar particular speakers (such as corporations and unions) from sponsoring independent expenditures. *Id.*

24. In the wake of *Citizens United*, numerous federal courts have held that political organizations like the Fund may accept and solicit unlimited donations from corporations and unions to make independent expenditures. *See, e.g., Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139 (7th Cir. 2011); *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010); *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc).

Advisory Opinion Request

25. On February 12, 2013, the Fund filed a request for an advisory opinion with ELEC pursuant to *N.J.S.A.* 19:44A-6(f). *See* Exhibit C.¹

26. The request proffered that the Fund intended to sponsor “independent expenditures” in New Jersey, as that term is defined in *N.J.A.C.* 19:25-12.7, and that, for the calendar year 2013, the Fund anticipated that these independent expenditures would comprise the majority of its overall budget. This is because New Jersey is one of only two states to hold state legislative elections in 2013. The Fund also represented that, over the four-year election cycle, its independent expenditures in New Jersey would comprise less than half of its overall budget.

27. In the request, the Fund also proffered that it intended to solicit general purpose contributions, to be used at the direction of the Fund in any state, as well as contributions earmarked to support its independent expenditure program in New Jersey.

28. The request presented two questions based on the Fund’s representations: (1) May the Fund accept unlimited contributions from individuals, unions, and corporations to make independent expenditures? (2) Would the Fund be considered a political committee under New Jersey law?

29. On March 21, 2013, ELEC issued its advisory opinion concluding (1) the Fund’s contemplated activity meets the definition of a political committee under the Act, and (2) as a political committee, the Fund must adhere to the contribution limits established by the Act. *See* Exhibit D.

¹ The Fund officially changed its name from “Fund for Jobs and Growth” to “Fund for Jobs, Growth, & Security” after filing its advisory opinion request.

30. With respect to its first conclusion, ELEC determined that “the Fund’s contemplated activity has as its major purpose the making of expenditures to support or defeat a candidate in a New Jersey election in 2013.” Exhibit D at 4. Based on the Fund’s representation that its independent expenditure program in New Jersey would comprise more than half of the organization’s spending in 2013 and its stated intention that it would solicit contributions earmarked for independent expenditures in New Jersey, ELEC concluded that, were the Fund to engage in its intended activity, it would have to register as a political committee under the Act.

31. As to the advisory opinion’s second conclusion, ELEC indicated it “is aware of the concerns presented in current case law in federal and other jurisdictions concerning the constitutionality of contribution limits imposed upon groups making only independent expenditures to support or oppose candidates.” Exhibit D at 5. It further recognized that *Citizens United* has held “that a federal prohibition on corporate independent expenditures was unconstitutional,” and that subsequently the Circuit Courts of Appeals for the District of Columbia, the Seventh Circuit, and the Ninth Circuit have held that contribution limits applied to political committees making independent expenditures are unconstitutional. *Id.*

32. ELEC confirmed that, notwithstanding these federal court decisions, it intends to continue to apply *N.J.S.A. 19:44A-11.5* to limit contributions to independent expenditure-only political committees, including the Fund, as the Commission “does not find that its statutory mandate permits it to carve out certain exceptions to the Reporting Act requirements based upon anticipated judicial or legislative actions.” Exhibit D at 5.

Harm to Plaintiff

33. The Fund is ready, willing, and able to solicit and accept unlimited contributions from all sources and to spend these funds on independent expenditures to promote the election or defeat of New Jersey state legislative candidates as its major purpose. Exhibit B ¶ 11.

34. The First and Fourteenth Amendments of the United States Constitution protect an organization's right to engage in this desired course of conduct.

35. Yet under *N.J.S.A.* 19:44A-11.5, as interpreted by ELEC, the Fund's desired course of conduct is impermissible.

36. Instead, ELEC compels organizations like the Fund to choose between two undesirable courses of action:

- a. The Fund may register as a political committee and limit its fundraising to \$7,200 per source; or
- b. The Fund must avoid engaging in the activities that would qualify it as a political committee. Specifically, it must keep its spending on independent expenditures in New Jersey sufficiently low so that this activity does not constitute its major purpose, forego soliciting and accepting contributions earmarked to support its independent expenditure program in New Jersey, and spend the majority of its resources instead on political speech other than express advocacy in New Jersey. *See* Exhibit B ¶ 13.

37. *N.J.S.A.* 19:44A-11.5 effectively limits what the Fund may spend on independent expenditures. This is plainly unconstitutional under *Citizens United*. “Put another way: If the First Amendment prohibits any limitation on how much money an independent political committee can spend on an independent-expenditure campaign, how can it permit limits on donations to committees that make only independent expenditures?” *Emily's List v. FEC*, 581

F.3d 1, 10 (D.C. Cir. 2009) (quoting Richard Briffault, *The 527 Problem and the Buckley Problem*, 73 Geo. Wash. L. Rev. 949, 982 (2005)).

38. But for the contribution limits contained in *N.J.S.A.* 19:44-11.5, the penalties imposed for violating that provision, and the ELEC advisory opinion confirming its intent to apply the contribution limit to the Fund, the Fund would register as a political committee, solicit and raise unlimited funds earmarked for independent expenditures in New Jersey, and use these funds to make independent expenditures to promote the election or defeat of New Jersey state legislative candidates.

39. The longer the Fund remains subject to the contribution limits imposed by *N.J.S.A.* 19:44A-11.5, the greater the impact on the Fund's ability to engage in independent expenditures to influence New Jersey elections in 2013. For instance, soon after the April 1, 2013 ballot qualification deadline, the Fund intends to make independent expenditures that expressly advocate the election and defeat of specific candidates. Exhibit B ¶ 15. The general election is just six months from the date of this Complaint, and the Fund must have the opportunity to solicit and accept contributions in any amount from individuals, corporations, and unions in order to plan and prepare for its independent expenditures in the weeks and months before the election. *Id.* ¶ 16.

40. The contribution limit imposed by *N.J.S.A.* 19:44-11.5 severely burdens Plaintiff's First Amendment right to engage in political speech. It also severely burdens Plaintiff's First Amendment right to associate with donors, potential donors, and other like-minded individuals, who seek to contribute money and pool their resources to allow for express advocacy in New Jersey.

41. Plaintiff faces imminent and impending injury in the near future (i.e., burdensome litigation, imposition of fines, and potential criminal prosecution) if it exercises its rights to free speech and association by raising and spending money in violation of the limitations imposed by the challenged law. Plaintiff is unwilling to expose itself to the legal consequences that will likely result from its accepting contributions in excess of the statutory limit and spending those funds to expressly advocate the election or defeat of specific candidates. Therefore, the chilling effect on Plaintiff's First Amendment rights to free speech and association is an actual and irreparable constitutional injury.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF Violations of the First Amendment 42 U.S.C. § 1983

42. Plaintiff restates and incorporates by reference the allegations of paragraphs 1 through 41 above as though fully set forth herein.

43. As the parties responsible for interpretation and enforcement of the Act, Defendants are liable for any action taken pursuant to the Act that violates Plaintiff's constitutional rights.

44. The First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, directs that the government "shall make no law . . . abridging the freedom of speech."

45. *N.J.S.A. 19:44A-11.5*, which prohibits political organizations dedicated solely to making independent expenditures from raising funds in excess of \$7,200 per election from each individual, union, or corporation, is unconstitutional as applied to Plaintiff under *Citizens United*, 130 S. Ct. 876.

46. The Fund is denied its First Amendment rights to free speech and association by the contribution limit set forth in *N.J.S.A.* 19:44A-11.5, which prohibits the Fund from soliciting, accepting, or receiving contributions in excess of \$7,200 per election from each individual, union, or corporation, and using those funds to engage in express advocacy.

47. In the face of harsh penalties for violating *N.J.S.A.* 19:44A-11.5, Plaintiff is chilled from exercising its First Amendment rights to free speech and association. Plaintiff's injury will continue into the future unless the challenged provision is declared unconstitutional as applied to Plaintiff and Defendants are enjoined from enforcing it against Plaintiff.

SECOND CLAIM FOR RELIEF
Violations of the Equal Protection Clause of the Fourteenth Amendment
42 U.S.C. § 1983

48. Plaintiff restates and incorporates by reference the allegations of paragraphs 1 through 47 above as though fully set forth herein.

49. As the parties responsible for interpretation and enforcement of the Act, Defendants are liable for any action taken pursuant to the Act that violates Plaintiff's constitutional rights.

50. Section 1 of the Fourteenth Amendment to the United States Constitution provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

51. As interpreted and applied by ELEC, *N.J.S.A.* 19:44A-11.5, which imposes contribution limits on New Jersey political committees that make independent expenditures but allows national political organizations to raise unlimited funds toward independent expenditures, treats Plaintiff differently from other similarly situated political organizations with respect to the

exercise of the fundamental right to free speech, in violation of the Equal Protection Clause of the United States Constitution.

THIRD CLAIM FOR RELIEF
Injunctive Relief

52. Plaintiff restates and incorporates by reference the allegations of paragraphs 1 through 51 above as though fully set forth herein.

53. The case law referenced above from the United States Supreme Court and several United States Courts of Appeals constitutes unchallenged judicial precedent that directly supports Plaintiff's position in this lawsuit. Accordingly, it is very likely that Plaintiff will prevail on the merits in this case.

54. Plaintiff has suffered, and will continue to suffer, real, immediate, and irreparable injury as a result of Defendants' enforcement of the contribution limit set forth in *N.J.S.A.* 19:44A-11.5. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Every day that passes before the November 5, 2013 election represents a lost opportunity for Plaintiff to engage in protected First Amendment activities.

55. Defendants will suffer no irreparable harm if they are prevented from enforcing *N.J.S.A.* 19:44A-11.5 in an unconstitutional manner.

56. An injunction would serve the public interest, as the public has a strong interest in vindicating constitutional rights.

57. Plaintiff has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

A. A declaration that the contribution limit contained in *N.J.S.A.* 19:44A-11.5, as well as any applicable rules and regulations regarding that provision, are unconstitutional as applied to Plaintiff;

B. Preliminary and permanent injunctions enjoining Defendants from enforcing the contribution limit set forth in *N.J.S.A.* 19:44A-11.5, as well as any applicable rules and regulations regarding that provision, against Plaintiff;

C. Costs and attorneys' fees pursuant to 42 U.S.C. § 1988 or any applicable statute or authority; and

D. Such other or further relief the Court deems to be just and appropriate.

Dated: April 5, 2013

Respectfully submitted,

By: s/Angelo J. Genova

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Attorneys for Plaintiff Fund for Jobs, Growth, &
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CERTIFICATION PURSUANT TO L. Civ. R. 11.2

The undersigned hereby certifies, pursuant to L. Civ. R. 11.2, that with respect to the matter in controversy herein, neither Plaintiff nor Plaintiff's attorney is aware of any other action pending in any court, or of any pending arbitration or administrative proceeding, to which this matter is subject.

CERTIFICATION PURSUANT TO L. Civ. R. 201.1

The undersigned hereby certifies, pursuant to L. Civ. R. 201.1, counsel for Plaintiff Fund hereby certifies that this action is excluded from compulsory arbitration because it is based on an alleged violation of a right secured by the Constitution of the United States and Plaintiff seeks permanent injunctive relief.

Dated: April 5, 2013

By: s/ Angelo J. Genova

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